



Whistleblower Protection

**WHISTLEBLOWER PROTECTION ACT OF 1989
and the
AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009**

OIG Whistleblower Protection:



The OIG Whistleblower Protection program provides counseling, guidance and possible early intervention, in cases of potential retaliation for disclosing all forms of waste, fraud, abuse or mismanagement, **including information relating to the misuse of stimulus funds as described in the American Recovery and Reinvestment Act of 2009.**



Whistleblower Protections



The Whistleblower Protection Act and **Section 1553** of the American Recovery and Reinvestment Act provide protections to employees against retaliation for making disclosures about illegal or improper acts of their **employers**.



Whistleblower Protection Act 1989:



The WPA of 1989 protects federal employees, applicants for federal employment and former federal employees who report misconduct.

A federal agency violates the WPA if it takes, fails to take (or threatens to take or fail to take) a personnel action because that person made a protected disclosure.

Employees who disclose should be free from fear of reprisal for “doing the right thing”.



American Recovery and Reinvestment Act



The American Recovery and Reinvestment Act is an **unprecedented** effort to jumpstart the U.S. economy, create or save millions of jobs...

The Recovery and Reinvestment Act is provides for **unprecedented** levels of **transparency and accountability** so that taxpayers will be able to know how, when, and where tax dollars are being spent.

SOURCE: RECOVERY.GOV



ARRA Funds



Congress appropriated **\$3.05 billion** to
The Department of the Interior via the Act.

To help safeguard these funds, the OIG must receive information from federal and state employees working with non-federal employers.

Protecting these non-federal employees from the fear of reprisal for reporting waste, fraud or abuse is vital and will be addressed by the OIG with vigor and diligence.



Scope of Protections



The protections provided by the Whistleblower Protection Act and Section 1553 of the American Recovery and Reinvestment Act of 2009 are very similar in many regards:

1. Who it covers
2. When it applies



Differences between the Acts



	WPA	ARRA-Section 1553
Who it covers:	Federal employee, former employee or applicant for federal employment.	Employee of a <i>non-federal employer</i> receiving stimulus funds.
When it applies:	Any protected disclosure.	Any protected disclosure relating to use or implementation of stimulus funds.



What is a Protected Disclosure?



A protected disclosure exists when a covered employee provides information that he/she **reasonably believes** evidences:

WPA	ARRA-Section 1553
<ol style="list-style-type: none">1. Gross mismanagement;2. Gross waste of funds;3. Substantial & specific danger to public health or safety;4. Abuse of authority;5. Violation of any law, rule or regulation.	<ol style="list-style-type: none">1. ...of an agency contract or grant relating to covered funds;2. ...of covered funds;3. ...related to the implementation or use of covered funds;4. ...related to the implementation or use of covered funds; or5. ...related to an agency contract (including the competition for or negotiation of a contract) or grant, awarded or issued relating to covered funds.



More on Protected Disclosures -



1. **Gross mismanagement –**

Management action that that creates a significant risk of adverse impact upon agency's ability to accomplish its mission.

2. **Gross Waste of Funds –**

No precise definition, but not intended to protect trivial or small amounts. More than debatable expenditures.



More on Protected Disclosures (con't)



3. **Substantial & Specific Danger to public health or safety –**

Not a general statement like the Department of the Interior is not doing enough for the environment.

4. **Abuse of Authority –**

Arbitrary capricious use of power.

5. **Violation of any law, rule or regulation -**

Information must be substantive, not mere disagreement or difference of opinion.



Protected Activity:



1. Testifying
2. Refusing to follow illegal order
3. Participating in official investigation
4. Related to a Whistleblower
5. Participating in other programs covered by law, e.g. EEO process



Covered Employees:



WPA

- Federal employee,
- Former employee or
- Applicant for federal employment

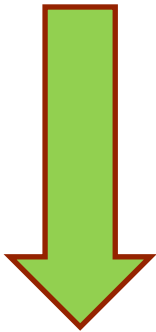
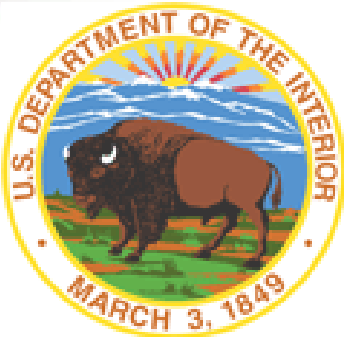
ARRA-Section 1553

Work for recipients of grants, contracts, or other funds made available or appropriated by the Act, **including:**

- Contractors
- Subcontractors
- Grantees
- State governments
- Professional body acting directly or indirectly in the interest of an employer receiving covered funds
- Local governments
- Insular areas
- Possessions and territories of the United States
- Tribes ??
- Any person, professional membership organization, certification, licensee or other



Potential Sources of Complaints:



DOI
Bureaus

BLM

BOR

FWS

NPS

USGS

Tribes

Non-Indian

Joe's Paving

Indian

Tom's
Construction

Mixed

Fred's IT

Disclosure must be made to:



The wrongful act(s) should be reported to:

WPA

- Any person (other than wrongdoer)

ARRA-Section 1553

- | | |
|--|--|
| <ul style="list-style-type: none">• The Recovery Accountability and Transparency Board• An Inspector General• The Comptroller General• A member of Congress• A State or Federal regulatory or law enforcement agency• A court or grand jury | <ul style="list-style-type: none">• The head of a Federal agency or his/her representatives• A person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct). |
|--|--|



Protections -



WPA

Prohibited personnel practices § 2302(b)(8) and/or (b)(9)

No personnel action shall be taken against any employee or applicant for employment for making a disclosure of information which the employee or applicant reasonably believes evidences illegal or improper government activities.

ARRA-Section 1553

A *covered* employee may not be discharged, demoted or “otherwise discriminated against” in retaliation for making a protected disclosure.

“Otherwise discriminated against”
– Not defined in the statute but could be interpreted as “materially adverse actions” as defined in a 2006 Supreme Court Case, *Burlington Northern v. White*. - Includes any action that would dissuade a reasonable person from engaging in protected conduct.



Forums for whistleblower protection:



WPA

1. Employee appeals to the Merit Systems Protection Board;
2. Actions instituted by the Office of Special Counsel (OSC);
3. Individual rights of action (IRA); and
4. Grievances brought by the employee under negotiated grievance procedures.

ARRA-Section 1553

The “appropriate Inspector General” that governs the entities and activities about which the initial disclosure was made.



NOTE :



Disclosure made during the ordinary course of an employee's duties ...

WPA

- Is generally not considered protected.

ARRA-Section 1553

- Is considered protected.



Motivations for Reprisal:



1. Fear
2. Anger
3. Embarrassment
4. Revenge



Reprisal elements:



1. Must make valid Protected Disclosure
2. Reprising Officials must have knowledge that disclosure was made.
3. Reprisal (something bad) must take place
4. Complainant must prove nexus between protected disclosure and reprisal

Note: Without all 4 of these present no Whistleblower Protection is available.



Management Defense:



Under both WPA and ARRA:

1. Management must be able to prove by **clear and convincing** evidence that they would have taken the action in spite of the disclosure.
2. Timing becomes very important to circumstantial proof on both sides.



Jurisdiction:



WPA

- OSC
- Fed agency;
- DOL (Sarbanes)

ARRA-Section 1553

- OIG when ARRA funds involved



Timeliness:



WPA

- Varies

ARRA-Section 1553

- Complete report 180 days after receipt of complainant;
- Extensions possible



No Investigation:



WPA

OSC will not refer/
investigate if:

- Complainant has no 1st hand knowledge;
- Anonymous disclosure;
- De minimis allegations;
- Investigated by an OIG

ARRA-Section 1553

- No ARRA funds;
- Frivolous; Does not merit investigation
- Other agency investigating;
- OIG discretion



Report Distribution:



WPA

- Whistleblower ;
- Secretary of Interior
- If conducted by OSC:
to the President and
Congressional
oversight committees.

ARRA-Section 1553

- Whistleblower;
- Secretary of
Department XYZ
- Non-fed employer
- The Recovery
Accountability and
Transparency Board



Non-Federal Employer Concerns:



1. No experience in dealing with WB'er protection
2. Opportunities for Waste, Fraud and Abuse are Vast
3. Employees become "eyes & ears" of Taxpayers
4. Further away from Washington – harder to track
5. Potentially overwhelming job for OIG's
6. Post Notice of rights – No posters exist
7. Companies will resist cooperation – more OIG work
8. Adopt written code of conduct, zero tolerance for retaliation, Mgr. training, "employee concerns" programs.



Whistleblowers Defined Con't



- Discloser must have reasonable belief of truth
- Disclosure can be :
 - made orally or in writing
 - made as part of employees duties
 - made outside of employees chain of command
 - made irrespective of motivation
- Protected even if employer mistakenly believes a disclosure was made



Remember 4 Factors



1. Protected Disclosure or Protected Activity?
2. Did Management know?
3. Did something bad happen, i.e., a prohibited personnel practice
4. Can the complainant connect their protected disclosure to the prohibited personnel practice they allegedly endured?

